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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. _____

AARON L. KATZ, Petitioner,

vs.

THE BANK OF CALIFORNIA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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May 21, 1981

Questions Presented

1. When does a violation under Truth-in-Lending occur for purposes of ruling upon a statute of limitations defense?

2. Does the defense of "fraudulent concealment" toll the statute of limitation under Truth-in-Lending?

3. Is the statute of limitation under Truth-in-Lending tolled until the lender attempts to assess the finance charge made the basis of a false, misleading or inaccurate disclosure where the credit transaction provides for the variation of finance charges under various contingencies?

4. Is the statute of limitation under Truth-in-Lending tolled until a reasonably prudent person is apprised of facts sufficient to place him on notice of a Truth-in- Lending violation where the credit transaction provides for the variation of finance charges under various contingencies?

5. Is the statute of limitation under Truth-in-Lending tolled as long as the lender is under a continuing duty to disclose matters which were previously falsely, misleadingly or inaccurately disclosed and relating to the variation of finance charges under various contingencies to be imposed in a credit transaction?

6. Is the statute of limitation under Truth-in-Lending inapplicable wherein legal action brought by a borrower is in effect a "defense" to affirmative action undertaken by a lender relating to previously disclosed false, misleading or

inaccurate information pertaining to a variation of finance charges under various contingencies to be imposed in a credit transaction?

7. Is it proper to grant a motion to dismiss under F.R.C.P. 12(b)(6) based upon a statute of limitations defense where it does not conclusively appear from the complaint that petitioner would be unable to prove a claim upon which relief could be granted?

8. By considering anything beyond the complaint in support of respondent's motion to dismiss, was the trial court required to treat the motion as one for summary judgment?

9. In treating respondent's motion to dismiss as one for summary judgment was it error to grant the motion wherein there existed viable issues of fact as to when the applicable statute of limitations commenced to run?

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No. _____

AARON L. KATZ, Petitioner,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner AARON L. KATZ respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 12, 1981.

Opinion Below

The opinion of the Court of Appeals appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of California inasmuch as the District Court entered

judgment after granting respondent's motion to dismiss.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 12, 1981. This petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

1. 15 U.S.C. §1640(a) permitting damages for a Truth-in-Lending violation;

2. 15 U.S.C. §1640(e) providing

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limitation provision of one year for a §1640 (a) violation;

3. 12 U.S.C. §2605 permitting damages for a Real Estate Settlement Procedures Act [RESPA] violation; [subsequently repealed]; and,

4. 12 U.S.C. §2614 providing limitation provision of one year for a §2605 violation.

The full texts of these statutory provisions appear in the Appendix hereto.

Statement of the Case

That prior to July of 1975, a relationship of trust and confidence existed between petitioner and respondent. Respondent was petitioner's bank; petitioner's checking account was maintained with respondent; petitioner's charge cards were maintained with respondent; and petitioner's wife was employed with respondent.

As an employee benefit, petitioner's wife was informed orally, and in respondent literature to employees, that real estate loans made to employees would carry various benefits not otherwise available to non-employee borrowers. The "employee benefit" provision in question in this appeal, is that the interest rate

appearing on the face of the note evidencing the loan would be reduced or "varied" by 1% as long as petitioner's wife [the employee] were employed by respondent.

With the foregoing understanding, petitioner applied for a real estate loan with his wife in July of 1975. The loan was quickly approved and petitioner was informed by respondent that the interest rate appearing on the face of the note would be reduced by 1% "as long as petitioner's wife were employed with respondent." Thereafter, a Truth-in-Lending disclosure statement was forwarded to petitioner pursuant to 12 U.S.C. §2605 and 15 U.S.C. §1631(a). At paragraph III(B) thereof the statement indicated as follows:

> "If the contract includes a provision for variation in the interest rate, describe: Employee Letter Rate of 8-1/2% as long as employed by the Bank of California."

On or about September 25, 1975, petitioner went to close escrow on the purchase of the real property made the subject of the loan herein and executed a standard printed promissory note [already bearing a date of September 17, 1975]

calling for interest to be paid at the rate of 9-1/2% per annum.

After escrow closed, respondent sent out a temporary coupon payment booklet wherein the payments were calculated at an 8-1/2% rate. The escrow company sent out a final closing statement indicating that pre-closing interest on monies advanced by respondent was calculated at 8-1/2%. Some time thereafter [although the date never appears in the record] respondent sent out its so called "employee letter" [bearing a date of October 20, 1975] addressed to petitioner and his wife, which was never disclosed to petitioner prior thereto. The letter requested that petitioner agree in writing to five additional and a more expansive provisions for varying the interest rate and monthly payment on the note signed September 25, 1975.

It was subsequently discovered, that in July of 1975 respondent was using a different so called "employee letter" that contained three additional and more expansive provisions which would allow respondent to increase monthly payments on its various employee loans [but the existence of such "employee letter" was not disclosed to petitioner]. This three condition "employee letter" differed

markedly from the five condition "employee letter" of October 20, 1975.

Petitioner refused to sign the so called "employee letter" containing five conditions. Payments were made by petitioner and were accepted by respondent on the loan of September 25, 1975 through December of 1976. All such payments were at the 8-1/2% employee rate.

In mid November of 1975, petitioner and his wife separated. On August 24, 1976 respondent prepared a letter directed only to petitioner's wife and at an address other than the address of petitioner. This letter was not received by petitioner at all, and was only received by petitioner's wife in the third week of September of 1976 [approximately one year after the date that petitioner executed the note evidencing the loan herein]. This letter purported to increase the rate of interest on the loan herein back to 9-1/2% [i.e., to impose the finance charge made the basis of a false, inaccurate or misleading disclosure]. This August 24, 1976 letter was thereafter mailed to petitioner by his estranged wife. A subsequent letter on November 9,

1976, for the first time, advised petitioner that all five of the conditions contained in respondent's so called "employee letter" of October 20, 1975, were deemed a part of the loan herein. Although petitioner's wife was still employed with respondent on November 9, 1976, the clause relied upon by respondent and pursuant to its October 20, 1975 "employee letter" as justification for increasing the interest rate on petitioner's loan, stated that, "you have been given notice by [respondent] of the termination of this agreement" [referring to the agreement to reduce the interest rate on the loan as long as petitioner's wife were employed with respondent].

Petitioner continued making payments to respondent until payments were no longer honored by respondent. At that time petitioner attempted to pay off the then outstanding loan in full, however, respondent refused to accept the money. Petitioner thereafter stopped making payments; respondent instituted non-judicial foreclosure under a power of sale clause contained in its mortgage securing the loan to petitioner; and

petitioner filed his lawsuit.

Petitioner's complaint clearly stated at paragraph 18 thereof that,

> "plaintiff was not aware of the fact that...defendant was relying upon the 10/20/75 letter...as being part of the 'employee letter rate' until November 9, 1976...."

Respondent filed a motion to dismiss petitioner's complaint under F.R.C.P. 12 (b)(1) as well as under F.R.C.P. 12(b)(6). [Clerk's Transcript (hereinafter referred to as "C.T.") 14-21]. The motion was denied [C.T. 34-35] and respondent filed its answer [C.T. 27]. Thereafter, respondent filed another motion to dismiss basically re-asserting the objections to jurisdiction made the basis of its initial motion to dismiss [C.T. 38]. Inasmuch as the motion to dismiss relied upon matters outside of the complaint itself, petitioner considered the motion to be one for summary judgment and submited a declaration in opposition thereto, which was considered by the court. The trial court granted respondent's motion to dismiss [C.T. 66] and thereafter entered judgment in favor of respondent [C.T. 67].

In granting respondent's motion, the trial court made it clear that it was not

limiting its ruling to F.R.C.P. 12(b)(1) nor to 12(h)(3), but rather was considering the same, in addition thereto, in effect being an order granting summary judgment under F.R.C.P. 56 [Reporter's Transcript (hereinafter referred to as "R.T."] 9:23-10:3. Petitioner timely appealed the District Court's Order and Judgment on February 13, 1978 [C.T. 69-70].

Reasons for Granting the Writ

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO WHEN A VIOLATION OCCURS UNDER TRUTH-IN-LENDING.

Occurrence of Violation

The District Court determined that a violation under Truth-in-Lending occurred no later than the date of contracting. Wachtel vs. West, 476 F.2d 1062 (6th Cir. 1974); Stevens vs. Rock Springs National Bank, 497 F.2d 307 (10th Cir. 1974); Munn vs. American General Investment Corp., 364 F.Supp. 110 (S.D.Tex. 1973).

However, other circuits have determined that the date of the occurrence can be different than the date of contracting. Munson vs. Thompson Homes, Inc., 395 F.Supp. 152, 159 (C.D.Minn. 1974).

> "...there are two points in time at which it c(an) be argued that [a violation occurs]...the first would be when [the customer] first use(s) [the lender's] service...the second would be the date that the customer (is) first individually notified as to the existence of the [violation]..."

And some circuits have determined that the date of the occurrence can be the date that the finance charge made the basis of an inaccurate disclosure is first imposed. When a type of disclosure is initially made by a lender [as opposed to no disclosure being made at all], and the disclosure is "false, incomplete or inaccurate," oftentimes it is not until the imposition of the finance charge made the basis of the false, incomplete or inaccurate disclosure, "that the debtor can perceive that a violation has occurred." Goldman vs. First Nat. Bank of Chicago, 532 F.2d 10, 19 (7th Cir. 1976), cert. denied at 429 U.S. 870, 97 S.Ct. 183 (1976). Consequently, false, misleading or inaccurate disclosures should be treated differently than the situation where no disclosure has been made "for the purpose of measuring the limitations period...when a cause of action accrue(s)..." Id., at 20. And as here, where there is evidence of a false,

misleading or inaccurate disclosure, "the limitations period should not be measured from the date the disclosure was required by law to be made, but instead by the date on which a finance charge was first imposed." Id., at 21. The reason therefore is that until the finance charge is levied by the lender, "the debtor has no cause for complaint since there has been no action inconsistent with the inaccurate disclosure." Id. Petitioner's complaint made it clear that he was not notified of the violation until November 9, 1976. The Court of Appeals felt that petitioner was notified of the violation on October 20, 1975 [even though no fact finding process took place in the district court]. It is submitted that such a decision contradicts the holdings in other circuits for four reasons. First of all, it affirms a determination made by the district court to disputed factual assertions at a motion to dismiss stage. Second, it condons a consideration of matters other than the complaint itself at a pleading stage. Third, it assumes that petitioner actually was given notice of the October 20, 1975 "employee letter" on October 20, 1975 [which was never factually established].

And fourth, it assumes that the "employee letter" of October 20, 1975, was in fact an embodiment of respondent's undisclosed terms in existence in July as well as on September 25, 1975 which is now clear was not the case.

Petitioner too has alleged herein, that he had no reason to complain prior to November 9, 1976, because before that date the respondent had not undertaken any action inconsistent with the inaccurate disclosure. Consequently, the date respondent was attempting to impose the finance charge made the basis of the inaccurate disclosure the "occurence of the violation" accrued.

Facts Warranting a Tolling of the Statute of Limitations.

Regardless of the date when a violation may technically occur under the Act, certain facts may warrant tolling of the statute of limitations. These facts when raised by a consumer, must likewise be considered by a trial court in determining when "the violation occurs."

The concept of tolling the statute of limitations where a wrongdoer is chargeable with concealment or fraud is certainly not a new concept. It is known commonly as the "fraudulent concealment"

rule and was first espoused in Bailey vs. Glover, 88 U.S. 342, 22 L.Ed. 636 (1875). Thereunder, "the statute is tolled as long as the fraud is concealed, or as long as the wrongdoer is under a duty to disclose and fails to do so." Also see Union Carbide and Carbon Corp. vs. Stapleton, 237 F.2d 229 (6th Cir. 1956); Pollard vs. U.S., 384 F.Supp. 304 (D.C.Ala. 1974).

> "The statute commences to run only after one has notice of circumstances sufficient to make a reasonably prudent person suspicious of fraud thus putting him on inquiry of fraud ...there being no prior duty to investigate and the statute...not run(ing) until he has sufficient knowledge of facts to put a reasonable man on inquiry." Briskin vs. Ernst & Ernst 589 F.2d 1363, 1367 (9th Cir. 1978).

This affirmative defense has been given applicability to Truth-in-Lending violations under the recent case of Chevalier vs. Baird Savings Association, 371 F.Supp 1282 (E.D.Penn. 1974).

The doctrine of "fraudulent concealment operates to suspend the application of the limitations period. Id., at 532 F.2d 20. The reason therefore is that Congress has sought to compel accurate disclosure, and the purposes of the Act are best served by allowing action

to proceed unbarred by the limitations period. Id., at 532 F.2d 22.

In this instance, the doctrine of fraudulent concealment has three dimensions. First, the concealment by respondent is "active;" that is, respondent intentionally concealed the terms varying the interest rate on petitioner's loan which it contends were in existence in July of 1975 [when it had its statutory duty to disclose]. Second, the statute of limitations should not commence to run until petitioner is given an opportunity to perceive that a violation has occurred regardless of whether or not active concealment has taken place [Goldman, supra, at 532 F.2d 20-21]. Third, the statute of limitations should not commence to run for as long as a continuing duty to disclose is present. The question as to whether a reasonably prudent person would have realized prior to November 9, 1976 that a violation occurred herein under Truth-in-Lending, could not be determined at the pleading stage where disputed facts were presented to the trier. And, under California law, a fiduciary relationship existed between the parties hereto [Wyatt vs. Union

Mortgage Co., 24 Cal.3d 773, 157 Cal. Rptr. 392 (1979)] requiring continued disclosure by respondent of terms that might vary the interest rate on petitioner's loan. Consequently, the breach of this duty constituted a fraud [California Civil Code, §2234] tolling the statute of limitations. And since petitioner never signed the October 20, 1975 "employee letter" which respondent relied upon in varying the interest rate on petitioner's loan [according to respondent], the "credit contract" between the parties hereto was never fully executed. This being the case, again, there was a continuing duty imposed upon respondent to disclose the true terms constituting a variance of its interest rate on the loan in question. Stevens vs. Rock Springs, supra, at 497 F.2d 310. Therefore, at the pleading stage, to make a determination that the statute of limitations commenced to run on the date of contracting [or on October 20, 1975] was contrary to the more expansive and progressive authorities noted hereinabove. Also see Littlefield vs. Walt Flanagan & Co., 498 F.2d 1133 (10th Cir. 1974).

2. THE DECISION BELOW MAKES IT ERRONEOUSLY APPEAR THAT IT IS PROPER TO DISMISS A COMPLAINT ASSERTING A TRUTH IN LENDING VIOLATION AT THE PLEADING STAGE WHEN VIABLE ISSUES OF FACT ARE ASSERTED AS TO WHEN THE STATUTE OF LIMITATIONS COMMENCES TO RUN AND WHETHER THE RUNNING OF THE STATUTE OF LIMITATIONS SHOULD BE TOLLED FOR SOME REASON.

In entertaining a motion to dismiss for failure to state a claim upon which relief can be granted [F.R.C.P. 12 (b)(6)] based upon the assertion that the applicable statute of limitations bars the action the motion can be granted only if the defense appears plainly on the face of the complaint itself. State of Ohio vs. Peterson, Lowry, Rall, Barber & Ross, 585 F.2d 454, 457 (10th Cir. 1978). However, where as here there is a dispute as to when the cause of action accrues, or whether circumstances warrant tolling of the statute of limitations, such dispute cannot be resolved by motion to dismiss. Davis vs. Howard, 561 F.2d 565, 571 (5th Cir. 1977); Newman Oil Co. vs. Atlantic Richfield Co., 597 F.2d 275, 278 (1979); California Dump Truck Owners Ass'n, Inc. vs. Associated General Contractors of America, etc., Inc., 562 F.2d 607, 614 (9th Cir. 1977); Renner vs. Rockwell

Intern. Corp., 587 F.2d 1030, 1032 (9th Cir. 1978).

Technically speaking, a statute of limitations defense is not even a defense enumerated under F.R.C.P. 12(b) [Sargent vs. Genesco, Inc., 352 F.Supp 66 (M.D.Fla. 1972)], and for this reason, when raised under the "guise" of a motion to dismiss, it must be considered as being a motion for summary judgment. Williams vs. Pacific Maritime Ass'n, 384 F.2d 935 (9th Cir. 1967). The reason therefore, is that there "may be facts warranting a finding of estoppel or equitable considerations warranting a tolling." Beamon vs. W.B. Saunders Co., 413 F.Supp. 1167 (E.D.Penn. 1976). Although cases involving defenses hinging on statutes of limitation occasionally lend themselves to summary judgment, where there is any viable issue of fact as to when the limitations period begins, the trial court should not grant summary judgment. State of Ohio, supra, at 585 F.2d 457. The motion should be used only with extreme caution for it operates to deny a litigant his day in court. Poller vs. Columbia Broadcasting, 368 U.S. 464, 467, 82 S.Ct. 486 (1962). There can be no room for controversy as to

whether the opposing party is entitled to recover under any discernible circumstances [Penne vs. Greater Minneapolis Area Board of Realtors, 604 F.2d 1143, 1148 (8th Cir. 1979)] for if there is, the motion should be denied. For this reason, the burden is on the moving party to conclusively establish that there exists no genuine issue as to a material fact and that the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion. Adickes vs. Kress & Co., 398 U.S. 144, 157-59, 90 S.Ct. 1598 (1970). Questions involving motive or intent [for instance in ruling upon a fraudulent concealment defense] are normally not suited to disposition on summary judgment. First National Bank vs. Cities Service, 391 U.S. 253, 284-85, 88 S.Ct. 1575 (1968). And in determining the question of whether a reasonably prudent person would be suspicious in a particular set of circumstances, a fact finding function by definition must take place. A trial judge can not assign conclusive legal effect at the summary judgment stage when there can be a genuine difference of

opinion as to its impact on a reasonable person. Briskin, supra, at 589 F.2d 1368.

Consequently, by definition, the trial court must have found that there was no dispute whatsoever as to when the statute of limitations commenced. If this had been the case, then there would not be an appeal. Because there is an appeal, it should be evident to the Court that at the pleading stage the trial court has exceeded its bounds. To allow the decision to stand is to encourage future courts to try factually disputed issues concerning equitable defenses potentially tolling the statute of limitations before the court has the benefit of all the evidence before it, and before plaintiff has the benefit of discovery. For instance, in this case, it was not until long after the case was dismissed at the trial court level, that petitioner learned that the October 20, 1975 letter was not even in use by respondent on September 25, 1975 [when the contract was executed], let alone when disclosures were required under Truth-in-Lending to have been made to petitioner. This being the case, how can it now be said that at the pleading stage, the petitioner was aware of the

inaccurately disclosed information appearing in an October 20, 1975 letter which was not in existence on the date of contracting?

3. BY ITS NATURE TRUTH IN LENDING IS OF SUCH IMPORTANCE TO THE CONSUMER AND HIS ACCESSABILITY TO THE COURT SYSTEM, SO THAT REVIEW BY THIS COURT WILL HELP TO ELIMINATE SIGNIFICANT AND RECURRING PROBLEMS THEREUNDER.

Although the Truth-in-Lending Act was enacted in 1968, its time limitation provisions "have been the subject of relatively little litigation." Stevens vs. Rock Springs National Bank, supra. And for reasons which will be come more clear hereinafter, such time provisions as they relate to terms varying the interest rate on home loans are becoming even more important than ever previously conceived.

The Truth-in-Lending Act is remedial in nature and should be liberally construed in an effort to effectuate the intent of Congress [Littlefield, supra, at 498 F.2d 1136; Porter vs. Household Finance Corp. of Columbus, 385 F.Supp. 336 (D.C. Ohio 1974); N.C. Freed Co., Inc. vs. Board of Governors of the Federal Reserve System, 473 F.2d 1210, 1214 (2d Cir. 1973)]; that is, "to enable the

consumer to compare more readily the various credit terms available to him, and to avoid the unininformed [or misinformed] use of credit." 15 U.S.C. §1601. Consequently, the purpose of the Act is furthered by permitting rather than barring litigation upon violations thereunder. Littlefield, Id. Since no provision was initially made in the Act for investigation nor enforcement at the federal level [upon the assumption that the civil penalty section would secure substantial compliance with the Act], enforcement of the Act is accomplished largely through the institution of civil actions. Wood Acceptance Co. vs. King, 18 Ill. App. 3d 149, 309 N.E.2d 403, 405 [at footnote 4].

Therefore, since placement of responsibility for enforcement of the Act is often left to the unknowledgeable consumer, his attempt to enforce the Act should not be circumvented where his claim is not stale. Id. Consequently, the court should construe the limitation provisions of the Act liberally to the extent that they enhance the purpose of the Act. And construing the time limitation provisions of the Act as commencing from the date

that a consumer has an opportunity to discover that a wrong has in fact occurred, in effect enhances the purpose of the Act. Goldman, supra, at 532 F.2d 21.

Petitioner's conclusion goes into the ramifications of the foregoing interpretation as it relates to the types of home mortgages currently in use today across the United States, and the types of home mortgages expected to be in use tomorrow across the United States. However, suffice it to say, Truth-in-Lending disclosures are required to be made prior to consummation of the credit transaction. 12 C.F.R. 226.8. And where a variation of the interest rate over the term of the credit transaction is contemplated in advance by a lender, there must be advance disclosure of all conditions under which the rate may be changed. 12 C.F.R. 226.810. It therefore takes little imagination to conjure up a factual situation where a false and misleading disclosure is made to a borrower prior to consummation of a home loan wherein it is contemplated that the interest rate on the loan will thereafter increase. Assuming that the increase were

not to take place before one year had elapsed from the date that the loan were initially consummated [whether coincidentally or by the design of the lender], is the consumer without a remedy under Truth-in Lending? This is the precise question presented herein. It is unfortunate that the Court of Appeals side stepped this issue, however, this Court is now invited to tackle the same.

Conclusion

This Court is probably asking itself why it should entertain petitioner's writ, especially in light of the Court of Appeal's limiting opinion. First of all, although it is not solely determinative of the inquiry, the district court's Order and the Court of Appeal's opinion are clearly wrong because they are both founded upon a consideration of more than that appearing in the complaint at a motion to dismiss stage. They are founded upon assumptions that the October 20, 1975 "employee letter" was in fact disclosed to petitioner; that it was disclosed to petitioner on October 20, 1975; and that its contents were in truth and in fact the inaccurately disclosed conditions in existence in July of 1975 when the

inaccurate disclosure required under Truth-in-Lending was in fact made to petitioner. Second, the Court of Appeal clearly side stepped the true issue presented by petitioner; namely, when does the limitation period under 15 U.S.C. §1640(e) commence? Not only has this Court never interpreted this aspect of Truth-in-Lending, but, the question has been and continues to be one of dispute between several Circuit Courts of Appeal. Third, Truth-in-Lending is a peculiar piece of legislation which especially depends upon the court system for enforcement so that consumers are seeking guidance from the highest Court in this land as to defenses available to them when a large institutional lender purposely waits in excess of one year after signing a credit contract to disclose conditions varying interest rates on home loans; being in a superior position to know the pitfalls to a consumer thereafter seeking a remedy under Truth-in-Lending. This question is perhaps even more germane today, than it was back in September of 1975 because fixed rate home mortgages are soon to be a thing of the past. New types of home mortgage instruments are being

implemented which systematically readjust interest rates over a thirty or forty year term. Although future home loan borrowers will not be faced with the exact contingencies presented to petitioner in July of 1975 relating to a variation in the interest rate on a home loan; they will be faced with contingencies which will be the subject of Truth-in-Lending disclosures at the inception of contracting. What then will happen to a consumer who enters into such a contract, and learns three or four years thereafter that the lender has made a false, misleading or inaccurate disclosure which goes back to the inception of the loan? If the mechanics of the loan do not reveal the violation until its operation in the market place, which occurs more than one year after initial contracting, then is the consumer to be foreclosed from seeking a remedy under Truth-in-Lending? The Court should remember that Truth-in-Lending is remedial legislation and is to be liberally construed in an effort to encourage the litigation of claims which are not stale. Certainly the within claim was and is not stale.

If this Court is going to adopt an

interpretation of time limitations under Truth-in-Lending which is comparable to time limitations under other federal statutes; then how can a trial court be allowed to determine whether a statute of limitation is tolled at the pleading stage without considering a triable issue of fact? By granting petitioner's writ, not only will the Court be resolving the differences appearing in several Circuits of the Courts of Appeal; but it will be laying down general equitable guidelines which will expand available remedies to the class of persons for which Truth-in- was enacted where a lender attempts to vary the interest rate on a credit transaction pursuant to misleading, false or inaccurate information or nondisclosure itself, more than one year after entering into the intial contract for credit.

Based upon the foregoing, petitioner prays that a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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May 21, 1981

APPENDIX

Appendix

12 U.S.C. §2605:

Formerly related to advance disclosure requirements similar to those required under 15 U.S.C. §1631(a) and lender's liability for failure to comply-repealed January 2, 1976.

12 U.S.C. §2614:

Any action to recover damages pursuant to the provisions of §§2605, 2607 or 2608 of this title may be brought in the United States district court for the district in which the property involved is located, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

15 U.S.C. §1631(a):

Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board (of Governors of the Federal Reserve System), to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part.

15 U.S.C. §1640(a):

Except as otherwise provided in this section, any creditor who fails in

connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of:

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100.00 nor greater than $1,000.00, and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

15 U.S.C. §1640(e):

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

Opinion on Appeal from United States District Court for the Northern District of California before the United States Court of Appeals, Ninth Circuit, Decided March 12, 1981

Before HUG and TANG, Circuit Judges, and MURRAY, District Judge.

TANG, Circuit Judge:

The parties here argue whether the one-year period of limitations contained in both the Truth in Lending Act, 15 U.S.C. section 1640(e), and the Real Estate Settlement Procedures Act, 12 U.S.C. section 2614, commences on the date the credit contract is executed, see Wachtel vs. West, 476 F.2d 1062 (6th Cir.) cert. denied, 414 U.S. 874, 94 S.Ct. 161, 38 L.Ed.2d 114 (1973), or at the time the plaintiff discovered, or should have discovered, the acts constituting the violation. See NLRB vs. Don Burgess Construction Corp., 596 F.2d 378 (9th Cir.), cert. denied, 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979) (applying general rule for commencement of federal periods of limitations) [footnote 1]. We

need not reach this issue because even applying the more expansive "discovery" rule, the district property dismissed Katz' complaint.

Mr. Katz alleged that in September 1975 he and his wife agreed to borrow $55,000.00 at 9-1/2% interest, but that due to Mrs. Katz' status as a bank employee, the Katzes annual percentage rate would be 8-1/2%, the rate listed on the Bank's Truth in Lending disclosure statement. Mr. Katz alleged that the Bank violated these statutes by failing to disclose before execution of the mortgage agreement that this "employee letter rate" of 8-1/2% would be raised to 9-1/2% if the property ceased to be Mrs. Katz' permanent residence. The bank, however, clearly disclosed to Mr. Katz the existence of the employee's permanent residency condition in a letter dated October 20, 1975, more than one year before Mr. Katz filed his complaint [footnote 2]. Mr. Katz argues that he regarded this letter merely as an attempt to modify an existing contract. [footnote 3]. Yet even if Mr. Katz did not know of the alleged Truth in Lending violation on October 20, 1975, the letter

made him aware of the acts constituting the violation, i.e., Mr. Katz had actual knowledge of the allegedly nondisclosed term. We hold therefore, that the period of limitations commenced no later than October 20, 1975, the date of actual disclosure.

Katz' alternative argument, that nondisclosure was a "continuing" violation must also be rejected. Even if a continuing violation theory is viable, the Bank's actual disclosure of the previously undisclosed term commenced the running of the period of limitations. Cf. Postow vs. OBA Federal Bank, 627 F.2d 1370, 1379-80 (D.C. Cir. 1980)(violation continues up to point of actual disclosure).

Finally, Katz argues that the district court erred in treating the Bank's motion to dismiss as one for summary judgment. The requirement that a district court treat a motion to dismiss as one for summary judgment applies where the motion to dismiss is brought pursuant to Federal Rules of Civil Procedure section 12(b)(6) and not rule 12(b)(1), which is the rule the Bank invoked to

dismiss Katz' second, third, and fourth causes of action. In any event, even if the district court was required to treat the matter as a motion for summary judgment, Katz was afforded the notice required by Federal Rules of Civil Procedure section 56, and was allowed to respond by way of affidavit.

The judgment of the district court is affirmed.

Footnotes:

1. Our discussion of §1640(e) applies with equal force to Katz' claim brought under the Real Estate Settlement Procedures Act and its limitations provision, 12 U.S.C. §2614, because the relevant language of the §2614 and §1640(e) provisions is nearly identical, and, the purpose of the two Acts are the same. See Vega vs. First Federal Savings & Loan Ass'n, 622 F.2d 918 (6th Cir. 1980)

2. The affidavits of both Mr. Katz and Mrs. Katz show that Mr. Katz had actual knowledge of the October 20 letter. They contradict Katz' disingenuous assertion

in his reply brief that it is a disputed fact whether he received and read the October 20, 1975 letter. His "proposed modification" theory also contradicts this statement.

3. nor would it do Katz any good to prove that the October 20, 1975 letter was in fact a proposed modification of an existing credit contract. If permanent residency condition was not part of the original contract, then the Bank breached no law in failing to disclose it.